A

Heidy Quah Gaik Li v Kerajaan Malaysia

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-01(A)-514–10 OF 2023
LEE SWEE SENG FCJ, HASHIM HAMZAH AND AZMAN ABDULLAH JJCA
26 AUGUST 2025

C

Constitutional Law — Legislation — Validity and constitutionality — Validity and constitutionality of impugned words of 'offensive' and 'annoy' in s 233 of Communications and Multimedia Act 1998 ('Act 588') constituting an offence — Whether impugned words in s 233 of Act 588 were not a permissible restriction D *for public order under art 10(2)(a) of Federal Constitution ('the FC') — Whether impugned words in s 233 of Act 588 were not restriction which was in pursuance of legitimate aim as required under art 10(2)(a) of the FC read with art 8 of the FC — Whether impugned words in s 233 of Act 588 were not restriction that was proportionate to legitimate aim under art 10(2)(a) of the FC read with art 8 of the* E *FC — Whether impugned words in s 233 of Act 588 amounted to prohibition and not restriction under art 10(2)(a) of the FC read with art 8 of the FC — Whether impugned words in s 233 of Act 588 were consistent with Malaysia's obligations under International Law — ASEAN Declaration of Human Rights — Communications and Multimedia Act 1998 s 233 — Federal Constitution* F *arts 8, 10(1)(a) & 10(2)(a) — United Nations' Universal Declaration of Human Rights 1948 article 19*

The appellant was charged in the sessions court under s 233(1)(a) of the Communications and Multimedia Act 1998 ('Act 588') for knowingly making G and initiating a transmission of offensive comments with intent to annoy others. This was in relation to her Facebook post about the spread of the Covid-19 pandemic in an immigration detention centre due to the lack of safety and health precautions taken. The appellant had raised a preliminary objection that the charge was defective and the sessions court had ruled in her H favour and granted her a discharge not amounting to an acquittal ('DNAA'). The appellant then filed originating summons for an order that the provisions of s 233 of Act 588, namely the words 'offensive' or 'annoy' or both, which made it an offence to knowingly make any comment which was offensive in character with the intent to annoy another person by means of application I services ('the impugned words in s 233 of Act 588'), was null and void as it was inconsistent with art 10 of the Federal Constitution ('the FC') read with art 8 of the FC. The High Court dismissed the appellant's application, hence, the present appeal. The issues to be determined by the court in the present appeal were: (a) whether the impugned words in s 233 of Act 588 were not a

permissible restriction under art 10(2)(a) of the FC where a law may be necessary on account of public order; (b) whether the impugned words in s 233 of Act 588 were not a restriction which was in pursuance of a legitimate aim as required under art 10(2)(a) of the FC read with art 8 of the FC; (c) whether the impugned words in s 233 of Act 588 were not a restriction that was proportionate to a legitimate aim under art 10(2)(a) of the FC read with art 8 of the FC; (d) whether the impugned words in s 233 of Act 588 amounted to a prohibition and not a restriction under art 10(2)(a) of the FC read with art 8 of the FC; and (e) whether the impugned words in s 233 of Act 588 were consistent with Malaysia's obligations under International Law. The respondent had objected to the appellant's locus standi on the ground that the appellant's case had been classified as 'No Further Action' ('NFA').

Held, allowing the appeal and setting aside the High Court's order with no order as to costs, and declaring that the decision to have prospective effect:

(1) It was trite law that the result of a DNAA order was that an accused person may at any time be charged in the future. The NFA classification was an internal matter between the deputy public prosecutor and the police and nothing prevented the accused from being charged again for the same or similar offence based on the same or substantially the same facts. With the charge hanging over her head for a substantial period of time and the prospect of being charged again in the future, the appellant certainly had the locus standi to pursue the present challenge on a matter affecting her constitutional rights (see paras 12–13).

(2) It was alarming that the impugned words in s 233 of Act 588 made it sufficient for a single communication to a single person that was said to be offensive and made with the intention to annoy to constitute an offence. It could not possibly be imagined that such an offence was created and aimed at preserving public order. It may at most affect 'law and order' but unlike other offences involving personal injury to one's body or possession, any restrictions to speech and expression may only be qualified if the offence affected 'public order'. In this regard, 'public order' connoted a greater and graver offence more serious than 'law and order'. The court agreed with the appellant's submission that the dictionary definition of 'offensive' and 'annoy' connoted triviality which had little or no bearing to pubic order (see paras 39, 48 & 52).

(3) The court accepted the fact that the freedom of expression under art 10(1)(a) of the FC was not a license for one to spread a false message or to perpetrate a lie. Neither could it be a justification for spreading falsehood. However, the court opined that an offensive communication with intent to annoy could not be affecting 'public order' and the criminalising of such an act would be an overreach by the State that guaranteed freedom of expression subject only to certain limited

restrictions which restriction on 'public order' did not apply in the present case. Not coming within the permitted restriction would render the law making such an 'offensive' communication with intent to 'annoy' unconstitutional (see paras 65–67).

(4) The intent and object of s 233 of Act 588, gathered from a proper construction of the impugned provision, was to regulate the civility of the discourse over the internet. The court agreed with the appellant's argument that criminalising offensive speech with the intent to annoy had no rational nexus to the legitimate aim of regulating the civility of the discourse over the internet because it wrongly assumed that society had a uniform standard in determining what was offensive. In this regard, s 233 of Act 388 did not provide any standards as to what amounted to offensive or what would amount to an intent to annoy. Further, art 8 of the FC enjoined that all actions of the State in restricting a fundamental right whether via legislative or executive action must be fair and not arbitrary or excessive. While civility of discourse over the internet would be ideal, the lack of it was not inimical nor injurious to society justifying policing 'offensive' speech with intent to 'annoy' (see paras 68, 71, 73, 80, 83 & 88).

(5) The impugned words in s 233 of Act 588 criminalised a broad range of everyday speech. What was more disturbing was that there appeared to be no defence or exceptions available to a person making offensive speech with the intention to annoy. One may hope that sensibilities would prevail over sensitivities but then again, the real prospect of being charged was enough to deter free speech on pain of suffering the penalty of imprisonment up to one year and a fine up to RM50,000 or both. The impugned words may not have caused any harm other than annoyance and yet the punishment of a term of imprisonment coupled with such a hefty fine for offensive speech made with the intention to annoy may be visited upon a person convicted of such an offence. That would be disproportionate to the legislative aim of Act 588 (see paras 92–93 & 95).

(6) The determination by the Legislature of what constituted a restriction was not final or conclusive. In this regard, the court was the guardian of the fundamental rights guaranteed by the FC. The court examined to see if a restriction had in reality rendered that right illusory in that it was in effect a prohibition. The broad sweep of s 233 of Act 588 was such that there were no exceptions to an offensive speech even if it was true. An entire category of speech that was offensive in character was completely prohibited by the impugned words in s 233 of Act 588, criminalising in its wake both protected as well as permitted or innocent speeches. The court appreciated that there was a strong presumption of the constitutional validity of any impugned provision of the law that was being challenged and the burden of proof lay on the party seeking to

establish the contrary. However, for the reasons given above, the court was more than satisfied that the burden of proof had been discharged (see paras 103–104, 108 & 111).

(7) As part of the international community, Malaysia had incorporated the human rights protected under the United Nations' Universal Declaration of Human Rights 1948 ('the UDHR') into our corpus of law for so long as these rights were not inconsistent with our FC. The court could not see how article 19 of the UDHR was inconsistent with the FC which guaranteed the same freedom under art 10(1)(a) of the FC. In fact, in the Recital to the adoption of the ASEAN Declaration of Human Rights ('ADHR') dated 18 November 2012, Malaysia together with the other ASEAN Member States reiterated '... commitment to the Charter of the United Nations, the Universal Declaration of Human Rights, ...'. Therefore, to retain the impugned words in s 233 of Act 588 would be inconsistent with our commitment to the principle and protection of freedom of expression that we had proudly reiterated and reaffirmed in the UDHR and ADHR (see paras 113, 116 & 127).

(8) On totality, the court found that the impugned words of 'offensive' and 'annoy' in s 233 of Act 588 constituting an offence was inconsistent with arts 10(1)(a) and 10(2)(a) of the FC read with art 8 of the FC and hence unconstitutional and void. It was not a permissible restriction to freedom of expression under the FC. The court therefore struck down that particular provision of s 233 of Act 588 consisting of the words 'offensive' and 'annoy' as constituting an offence (see para 128).

[Bahasa Malaysia summary

Perayu telah dituduh di mahkamah sesyen di bawah s 233(1)(a) Akta Komunikasi dan Multimedia 1998 ('Akta 588') kerana dengan sengaja membuat dan memulakan penghantaran komen yang jelik dengan niat untuk menyakitkan hati orang lain. Ini berhubung dengan siaran Facebooknya mengenai penularan wabak Covid-19 di pusat tahanan imigresen disebabkan oleh kekurangan langkah keselamatan dan kesihatan yang diambil. Perayu telah membangkitkan bantahan awal bahawa pertuduhan tersebut cacat dan mahkamah sesyen telah membuat keputusan yang memihak kepadanya dan memberikannya pelepasan tidak berjumlah pembebasan ('PTBP'). Perayu kemudiannya memfailkan saman pemula untuk mendapatkan perintah bahawa peruntukan s 233 Akta 588, iaitu perkataan 'jelik' atau 'menyakitkan hati' atau kedua-duanya, yang menjadikannya suatu kesalahan untuk membuat apa-apa komen secara sedar yang bersifat jelik dengan niat untuk menyakitkan hati orang lain melalui perkhidmatan aplikasi ('perkataan yang disangkal dalam s 233 Akta 588') adalah terbatal kerana ia tidak selaras dengan perkara 10 Perlembagaan Persekutuan ('PP') dibaca bersama perkara 8 PP. Mahkamah Tinggi menolak permohonan perayu, justeru, rayuan semasa. Isu-isu yang perlu ditentukan oleh mahkamah dalam rayuan semasa ialah:

(a) sama ada perkataan yang disangkal dalam s 233 Akta 588 bukanlah sekatan yang dibenarkan di bawah perkara 10(2)(a) PP di mana undang-undang mungkin diperlukan demi ketenteraman awam; (b) sama ada perkataan yang disangkal dalam s 233 Akta 588 bukanlah sekatan berdasarkan matlamat yang sah seperti yang dikehendaki di bawah perkara 10(2)(a) PP yang dibaca dengan perkara 8 PP; (c) sama ada perkataan yang disangkal dalam s 233 Akta 588 bukanlah sekatan yang berkadar dengan matlamat yang sah di bawah perkara 10(2)(a) PP yang dibaca dengan perkara 8 PP; (d) sama ada perkataan yang disangkal dalam s 233 Akta 588 merupakan larangan dan bukan sekatan di bawah perkara 10(2)(a) PP yang dibaca dengan perkara 8 PP; dan (e) sama ada perkataan yang disangkal dalam s 233 Akta 588 adalah konsisten dengan tanggungjawab Malaysia di bawah Undang-Undang Antarabangsa. Responden telah membantah locus standi perayu atas alasan bahawa kes perayu telah diklasifikasikan sebagai 'No Further Action' ('NFA').

Diputuskan, membenarkan rayuan dan mengenepikan perintah Mahkamah Tinggi tanpa perintah mengenai kos, dan mengisytiharkan bahawa keputusan mahkamah mempunyai kesan prospektif:

(1) Sudah menjadi undang-undang yang mantap bahawa kesan daripada perintah PTBP adalah bahawa orang yang dituduh boleh pada bila-bila masa dituduh pada masa hadapan. Klasifikasi NFA adalah perkara dalaman antara timbalan pendakwa raya dan polis dan tiada apa yang menghalang tertuduh daripada dituduh semula atas kesalahan yang sama atau serupa berdasarkan fakta yang sama atau sebahagian besarnya sama. Dengan pertuduhan yang tergantung di atas kepalanya untuk tempoh masa yang lama dan prospek untuk dituduh semula pada masa hadapan, perayu tentunya mempunyai locus standi untuk meneruskan cabaran semasa mengenai perkara yang menjejaskan hak perlembagaannya (lihat perenggan 12–13).

(2) Adalah membimbangkan bahawa perkataan yang disangkal dalam s 233 Akta 588 menjadikannya memadai untuk satu komunikasi kepada seorang yang dikatakan jelik dan dibuat dengan niat untuk menyakitkan hati boleh menjadi suatu kesalahan. Tidak dapat dibayangkan bahawa kesalahan sebegitu diwujudkan dan bertujuan untuk memelihara ketenteraman awam. Ia mungkin, jika ada pun, menjejaskan 'undang-undang dan ketenteraman' tetapi tidak seperti kesalahan lain yang melibatkan kecederaan peribadi pada badan atau pemilikan seseorang, apa-apa sekatan untuk bercakap atau bersuara hanya layak jika sesuatu kesalahan itu menjejaskan 'ketenteraman awam'. Dalam hal ini, 'ketenteraman awam' bermaksud kesalahan yang lebih besar dan lebih serius daripada 'undang-undang dan ketenteraman'. Mahkamah bersetuju dengan hujahan perayu bahawa takrif kamus 'jelik' dan 'menyakitkan hati' berkonotasi remeh yang mempunyai sedikit atau tiada kaitan dengan ketenteraman awam (lihat perenggan 39, 48 & 52).

(3) Mahkamah menerima hakikat bahawa kebebasan bersuara di bawah perkara 10(1)(a) PP bukanlah lesen untuk seseorang menyebarkan mesej palsu atau melakukan pembohongan. Ia juga tidak boleh menjadi alasan untuk menyebarkan kepalsuan. Walau bagaimanapun, mahkamah berpendapat bahawa komunikasi yang jelik dengan niat untuk menyakitkan hati tidak boleh menjejaskan 'ketenteraman awam' dan penjenayahan tindakan sedemikian berjumlah kepada penyalahgunaan kuasa oleh pihak berkuasa yang menjamin kebebasan bersuara tertakluk hanya kepada sekatan terhad tertentu yang mana sekatan ke atas 'ketenteraman awam' tidak terpakai dalam kes semasa. Undang-undang yang menjadikan komunikasi yang 'jelik' dengan niat untuk 'menyakitkan hati' tersebut adalah tidak berperlembagaan memandangkan undang-undang tersebut tidak termasuk dalam sekatan yang dibenarkan (lihat perenggan 65–67).

(4) Niat dan objektif s 233 Akta 588, yang dikumpulkan daripada pentafsiran yang betul bagi peruntukan yang dipertikaikan, adalah untuk mengawal kesopanan wacana melalui internet. Mahkamah bersetuju dengan hujah perayu bahawa menjenayahkan ucapan yang jelik dengan niat untuk menyakitkan hati tidak mempunyai hubungan rasional dengan matlamat yang sah untuk mengawal kesopanan wacana melalui internet kerana ia secara salah menganggap bahawa masyarakat mempunyai piawaian yang seragam dalam menentukan perkara yang jelik. Dalam hal ini, s 233 Akta 388 tidak memperuntukkan apa-apa piawaian tentang perkara yang jelik atau apa yang berjumlah kepada niat untuk menyakitkan hati. Selanjutnya, perkara 8 PP mengarahkan bahawa semua tindakan pihak berkuasa dalam menyekat hak asasi sama ada melalui tindakan perundangan atau eksekutif haruslah adil dan tidak sewenang-wenangnya atau keterlaluan. Walaupun kesopanan berwacana melalui Internet adalah ideal, ketiadaannya tidak bertentangan atau memudaratkan masyarakat yang menjustifikasikan pengawasan ucapan 'jelik' dengan niat untuk 'menyakitkan hati' (lihat perenggan 68, 71, 73, 80, 83 & 88).

(5) Perkataan yang disangkal dalam s 233 Akta 588 menjenayahkan pelbagai pertuturan seharian. Apa yang lebih membimbangkan ialah kelihatannya tiada pembelaan atau pengecualian yang tersedia untuk seseorang yang membuat ucapan yang jelik dengan niat untuk menyakitkan hati. Seseorang mungkin berharap bahawa sensibiliti akan mengatasi sensitiviti, namun begitu, prospek sebenar untuk didakwa sudah cukup untuk menghalang kebebasan bersuara di atas ketakutan untuk menjalani hukuman penjara sehingga satu tahun dan denda sehingga RM50,000 atau kedua-duanya. Perkataan yang disangkal tersebut mungkin tidak mendatangkan apa-apa kemudaratan selain daripada menyakitkan hati, namun hukuman penjara ditambah dengan denda yang tinggi untuk ucapan yang jelik yang dibuat dengan niat untuk

menyakitkan hati boleh dikenakan ke atas seseorang yang disabitkan dengan kesalahan tersebut. Itu akan menjadi tidak berkadar dengan matlamat perundangan Akta 588 (lihat perenggan 92–93 & 95).

(6) Penentuan oleh Badan Perundangan tentang apa yang berjumlah kepada sekatan bukanlah tetap atau muktamad. Dalam hal ini, mahkamah adalah penjaga hak asasi yang dijamin oleh PP. Mahkamah meneliti untuk melihat sama ada sesuatu sekatan sebenarnya telah menjadikan hak tersebut manjadi ilusi kerana ia sebenarnya satu larangan. Skop luas s 233 Akta 588 adalah sedemikian rupa sehingga tidak ada pengecualian kepada ucapan yang jelik walaupun ia benar. Keseluruhan kategori ucapan yang bersifat jelik telah dilarang sama sekali oleh perkataan yang disangkal dalam s 233 Akta 588, yang menjenayahkan ucapan yang dilindungi serta dibenarkan atau ikhlas. Mahkamah menghargai bahawa terdapat anggapan kuat terhadap keabsahan perlembagaan bagi mana-mana peruntukan undang-undang yang dipertikaikan yang dicabar dan beban pembuktian terletak pada pihak yang ingin membuktikan sebaliknya. Walau bagaimanapun, atas alasan-alasan yang diberikan di atas, mahkamah sangat berpuas hati bahawa beban pembuktian tersebut telah dipenuhi (lihat perenggan 103–104, 108 & 111).

(7) Sebagai sebahagian daripada masyarakat antarabangsa, Malaysia telah memasukkan hak asasi manusia yang dilindungi di bawah United Nations' Universal Declaration of Human Rights 1948 ('UDHR') ke dalam korpus undang-undang kita selama mana hak-hak ini tidak bercanggah dengan PP. Mahkamah tidak dapat melihat bagaimana perkara 19 UDHR tidak konsisten dengan PP yang menjamin kebebasan yang sama di bawah perkara 10(1)(a) PP. Malah, dalam Recital untuk menerima pakai ASEAN Declaration of Human Rights ('ADHR') bertarikh 18 November 2012, Malaysia bersama-sama Negara-Negara Anggota ASEAN yang lain mengulangi '... commitment to the Charter of the United Nations, the Universal Declaration of Human Rights, ...'. Oleh itu, pengekalan perkataan yang disangkal dalam s 233 Akta 588 adalah tidak selaras dengan komitmen kita terhadap prinsip dan perlindungan kebebasan bersuara yang kita telah dengan bangganya mengulangi dan menegaskan semula dalam UDHR dan ADHR (lihat perenggan 113, 116 & 127).

(8) Secara keseluruhannya, mahkamah mendapati bahawa perkataan 'jelik' dan 'menyakitkan hati' yang disangkal dalam s 233 Akta 588 yang menjadi kesalahan adalah tidak selaras dengan perkara 10(1)(a) dan 10(2)(a) PP dibaca dengan perkara 8 PP dan oleh itu tidak berperlembagaan dan tidak sah. Ia bukan sekatan yang dibenarkan kepada kebebasan bersuara di bawah PP. Oleh itu mahkamah telah membatalkan peruntukan khusus s 233 Akta 588 yang terdiri daripada

perkataan 'jelik' dan 'menyakitkan hati' yang menjadi kesalahan (lihat perenggan 128).]

Cases referred to

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27, HC (refd)
Alma Nudo Atenza v PP and another appeal [2019] 4 MLJ 1; [2019] 5 CLJ 780, FC (refd)
Amir Hariri bin Abd Hadi v PP [2025] 4 MLJ 807, FC (refd)
Application of Tan Boon Liat @ Allen, Re; Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors [1976] 2 MLJ 83 (refd)
Arun Ghosh v State of West Bengal AIR 1970 SC 1228, SC (refd)
CCH & Anor (on behalf of themselves and as litigation representatives of one CYM, a child) v Pendaftar Besar bagi Kelahiran dan Kematian, Malaysia [2022] 1 MLJ 71; [2022] 1 CLJ 1, FC (refd)
Chintaman Rao v The State of Madhya Pradeshram [1950] SCR 759, SC (refd)
Chong Ton Sin (t/a Gerakbudaya Enterprise) & Anor v Menteri Dalam Negeri & Anor [2023] 7 MLJ 118, HC (refd)
Chung Chi Cheung v R [1939] AC 160, PC (refd)
Cohen v California (1971) 403 US 15, SC (refd)
Collector and District Magistrate v S Sultan AIR 2008 SC 2096, SC (refd)
CTEB & Anor v Ketua Pengarah Pendaftaran Negara, Malaysia & Ors [2021] 4 MLJ 236; [2021] 6 CLJ 471, FC (refd)
Darma Suria bin Risman Saleh v Menteri Dalam Negeri, Malaysia & Ors [2010] 3 MLJ 307, FC (refd)
Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia [2006] 6 MLJ 213, CA (refd)
Dr Ram Manohar Lohia v State of Bihar and others AIR 1966 SC 740, SC (refd)
Iki Putra bin Mubarrak v Kerajaan Negeri Selangor & Anor [2021] 2 MLJ 323; [2021] 3 CLJ 465, FC (refd)
Ketheeswaran a/l Kanagaratnam & Anor v PP [2024] 1 MLJ 851; [2024] 2 CLJ 341, FC (refd)
Lai Hen Beng v PP [2024] 1 MLJ 225; [2024] 1 CLJ 681, FC (refd)
Lee Kwan Woh v PP [2009] 5 MLJ 301; [2009] 5 CLJ 631, FC (refd)
Martina bt Abu Hanifa lwn Pendakwa Raya [2021] MLJU 1724, HC (refd)
Mat Shuhaimi bin Shafiei v PP [2014] 2 MLJ 145, CA (refd)
Monis and Another v R [2013] 4 LRC 732, HC (refd)
Muhammad Hilman bin Idham & Ors v Kerajaan Malaysia & Ors [2011] 6 MLJ 507, CA (refd)
Nik Nazmi bin Nik Ahmad v PP [2014] 4 MLJ 157, CA (refd)
Pendakwa Raya v Cheah Beng Poh & Ors [1984] 2 MLJ 225; [1984] 2 CLJ Rep 383 (folld)
PP v Azmi bin Sharom [2015] 6 MLJ 751, FC (refd)
PP v Datuk Harun bin Haji Idris & Ors [1976] 2 MLJ 116 (refd)

Rosliza bt Ibrahim v Kerajaan Negeri Selangor & Anor [2021] 2 MLJ 181, FC (refd)
Schenck v United States (1919) 249 US 47, SC (refd)
Shreya Singhal v Union of India [2015] 3 MLJ 162, SC (refd)
SIS Forum (M) v Kerajaan Negeri Selangor (Majlis Agama Islam Selangor, intervener) [2022] 2 MLJ 356; [2022] 3 CLJ 339, FC (refd)
Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2010] 2 MLJ 333, FC (refd)
Subramaniam a/l Letchimanan v The United States of America and another appeal [2021] 5 MLJ 612, CA (refd)
Syarul Ema Rena bt Abu Samah lwn Pendakwa Raya [2018] MLJU 1128, HC (refd)

Legislation referred to

Communications Act 2003 [UK] s 127
Communications and Multimedia (Amendment) Act 2025 s 91, 91(1)(a)
Communications and Multimedia Act 1998 ss 3, 3(3), 233, 233(1), (1)(a)
Criminal Code [AU] s 471.12
Federal Constitution arts 4(1), 8, 8(1), 10, 10(1)(a), (2)(a), Part II
Human Rights Commission of Malaysia Act 1999 s 4(1), (4)
Indian Constitution [IN] art 19, 19(2)
Information Technology Act 2000 [IN] s 66A
Minor Offences Act 1955 s 14
Peaceful Assembly Act 2012 s 9(5)
Penal Code ss 209, 268, 294, 351, 441, 498, 504, 505, 510
Post Office (Amendment) Act 1935 [UK] (repealed by Post Office Act 1953) s 19(2)
Post Office Act 1947 (repealed by Postal Services Act 1991) s 28
Post Office Act 1953 [UK] (repealed by Postal Services Act 2000) s 66
Post Office Act 1969 [UK] s 78
Post Office Protection Act 1884 [UK] (repealed by Telecommunications Act 1984) s 4(1)
Postal Services Act 1991 (repealed by Postal Services Act 2012) s 18
Telecommunications Act 1981 [UK] (repealed by Telecommunications Act 1984) s 49(1)(a)
Telecommunications Act 1984 [UK] s 43(1)(a)

Appeal from: Originating Summons No BA-24-18–08 of 2021 (High Court, Shah Alam)

Malik Imtiaz Sarwar (with Surendra Ananth, Yvonne Lim, Nur Izni Syazwani and New Sin Yew) (Amerbon) for the appellant.
Liew Horng Bin (Senior Federal Counsel, Attorney General's Chambers); and Farhati bt Ahmad Tajuddin (with Nordalina bt Ali) (Senior Federal Counsel, Malaysian Communications and Multimedia Commission) for the respondent.

Kee Hui Yee watching brief for Malaysian Bar
Lim Wei Jiet watching brief for Suara Rakyat Malaysia (SUARAM) and Clooney Foundation for Justice).

Lee Swee Seng FCJ:

[1] On 5 June 2020, at the height of the Covid-19 pandemic, the appellant Heidy Quah tapped the 'Send Message' button of her Facebook account to post about the spread of the pandemic in an immigration detention centre among the detainees there, attributing the cause to the lack of safety and health precautions that were supposed to have been taken and the appalling and cramped living conditions at the centre.

[2] Little did she know that she would be charged in the sessions court some one year later on 27 July 2021 under s 233(1)(a) of the Communications and Multimedia Act 1998 ('the CMA') for knowingly making and initiating a transmission of offensive comments with intent to annoy others.

[3] The offence carries a fine not exceeding RM50,000 or imprisonment for up to one year, or both, with a further fine of RM1,000 for each day the offence continues after conviction.

[4] She raised a preliminary objection on 14 April 2022 before the sessions court on ground that the charge was defective and the sessions court ruled in her favour on 25 April 2022 and granted her a discharge not amounting to an acquital ('DNAA'). That means that she could still be charged anytime in the future.

IN THE HIGH COURT

[5] Even before the preliminary objection was raised in the sessions court which was sustained by the sessions court, she had on 30 August 2021, filed an application by way of an originating summons at the Shah Alam High Court, seeking for an order that the provisions of s 233 of the CMA, namely the words 'offensive' or 'annoy' or both, which makes it an offence to knowingly make any comment which is offensive in character with the intent to annoy another person by means of application services ('the impugned words of s 233 of the CMA'), is null and void as it is inconsistent with art 10 of the Federal Constitution ('the FC') read with art 8.

[6] On 12 September 2023, the High Court, dismissed the application without any order as to costs. The High Court held that the appellant's argument that the words 'offensive' or 'annoy' are void for vagueness per se because they are not defined in the CMA is fundamentally misguided.

[7] The High Court had relied on another High Court case of *Syarul Ema Rena bt Abu Samah lwn Pendakwa Raya* [2018] MLJU 1128 ('Syarul Ema Rena'), where it was held that in interpreting s 233 of the CMA, the court must be guided by the local context in Malaysia based on the objective, surrounding circumstances, and the principles on which the CMA was drafted.

[8] The High Court had found further support for its decision in another High Court case of *Martina bt Abu Hanifa lwn Pendakwa Raya* [2021] MLJU 1724 ('Martina bt Abu Hanifa'), which found that there is no merit in the argument that s 233 of the CMA is vague, too broad, did not give fair notice as to the prohibited activity or that it is open to abuse.

BEFORE THE COURT OF APPEAL

[9] The appellant submitted before us that the High Court had erred in dismissing the originating summons based on the following grounds that the impugned words in s 233 of the CMA are unconstitutional in that:

(a) they are not a permissible restriction under art 10(2)(a) of the FC where a law may be necessary on account of public order;

(b) they are not a restriction which is in pursuance of a legitimate aim as required under art 10(2)(a) of the FC read with art 8 of the FC;

(c) they are not a restriction that is proportionate to a legitimate aim under art 10(2)(a) of the FC read with art 8 of the FC; and

(d) they are a prohibition and not a restriction under art 10(2)(a) of the FC read with art 8 of the FC.

[10] It was also highlighted to us that the High Court had totally misappreciated the appellant's arguments in only considering whether the impugned words in s 233 of the CMA are void for vagueness. Such argument was not made by the appellant in the High Court.

[11] Learned senior federal counsel ('SFC') Liew Horng Bin for the respondent had objected to her locus standi to make this application as the investigating officer had on 16 June 2023 affirmed an affidavit to say that he had received instructions from the deputy public prosecutor ('DPP') that the file is to be closed on ground of 'No Further Action' ('NFA') is necessary.

[12] It is trite law that the result of a DNAA order is that an accused person may at any time be charged in the future. The NFA classification is an internal matter between the DPP and the police and nothing prevents the accused from being charged again for the same or similar offence based on the same or substantially the same facts.

[13] With the charge hanging over her head for a substantial period of time and the prospect of being charged again in the future, she certainly had the locus standi to pursue this challenge on a matter affecting her constitutional rights.

THE ROOTS OF OUR S 233 OF THE CMA AND THE SUBSEQUENT AMENDMENT

[14] It is true that before there was communications via the internet, we had the relatively slow communication via the postal service and such a prohibition was found on s 28 of the now repealed Post Office Act 1947. The words used then before it could constitute an offence were that of 'grossly offensive character'. Postal Services Act 1991 (Act 465) replaced the Post Office Act 1947 and s 18 thereof retained the use of the expression 'grossly offensive character'.

[15] Our s 28 of the Post Office Act 1947 had borrowed from the provision of s 4(1) of the UK's Post Office Protection Act 1884 that contained the prohibition of 'grossly offensive character' on the postal packet. With the arrival of the telephone and the telegram the UK introduced s 19(2) of the Post Office (Amendment) Act 1935 and the terms 'grossly offensive' and 'causing annoyance' were present. Later it found its way into s 66 of the UK Post Office Act 1953 and various UK legislations like s 78 of the Post Office Act 1969, s 49(1)(a) of the British Telecommunications Act 1981, s 43(1)(a) of the Telecommunications Act 1984 and s 127 of the Communications Act 2003.

[16] Section 127 of the UK Communications Act 2003 reads as follows:

> 127 Improper use of public electronic communications network
>
> (1) A person is guilty of an offence if he —
>
> (a) sends by means of a public electronic communications network a message or other matter that is *grossly offensive* or of an indecent, obscene or menacing character; or
>
> (b) causes any such message or matter to be so sent.
>
> (2) A person is guilty of an offence if, for the purpose of *causing annoyance*, inconvenience or needless anxiety to another, he —
>
> (a) sends by means of a public electronic communications network, a message that he knows to be false,
>
> (b) causes such a message to be sent; or
>
> (c) persistently makes use of a public electronic communications network.

(3) A person guilty of an offence under this section shall be liable, on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale, or to both. (Emphasis added.)

[17] Our s 233 of the CMA is similar to and perhaps had drawn inspiration from the s 127 of the UK Communications Act 2003 and it reads as follows:

233 *Improper use of network facilities or network service, etc.*

(1) *A person who —*

(a) *by means of any network facilities or network service or applications service knowingly —*

(i) *makes, creates or solicits; and*

(ii) *initiates the transmission of,*

any comment, request, suggestion or other communication which is obscene, indecent, false, *menacing* or offensive in character with intent to *annoy*, abuse, threaten or harass another person; or

(b) initiates a communication using any applications service, whether continuously, repeatedly or otherwise, during which communication may or may not ensue, with or without disclosing his identity and with intent to annoy, abuse, threaten or harass any person at any number or electronic address, *commits an offence.*

...

(3) A person who commits an offence under this section shall, on conviction, be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding one year or to both and shall also be liable to a further fine of one thousand ringgit for every day during which the offence is continued after conviction. (Emphasis added.)

[18] The position in India is of great relevance given the similarities in our colonial history and our constitutions. In this regard, s 66A of the Information Technology Act 2000 is similar to our s 233 of the CMA and it reads as follows:

66A *Punishment for sending offensive messages through communication service, etc.*

Any person who sends, by means of a computer resource or a communication device

(a) any information that is *grossly offensive* or has menacing character; or

(b) any information which he knows to be false, but for the purpose of *causing annoyance*, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device;

(c) any electronic mail or electronic mail message for the purpose of *causing annoyance* or inconvenience or to deceive or to mislead the addressee or

recipient about the origin of such messages,

shall be punishable with imprisonment for a term which may extend to three years and with fine. (Emphasis added.)

[19] For some inexplicable reasons the words 'grossly offensive' rather than 'offensive' did not find its way into s 233 of the CMA. It would be fair to say that the term 'offensive' is wider and broader than the term 'grossly offensive'.

[20] There was a recent amendment to s 233(1) of the CMA effected by s 91 of the Communications and Multimedia (Amendment) Act 2025 (Act A1743) in para (1)(a) by substituting the word 'offensive' for the words 'grossly offensive'. The amendment came into force on 11 February 2025 (PU(B) 61/2025) and *gazetted* on 7 February 2025. As this constitutional challenge is with respect to the pre-amendment position, we shall make no comments on its constitutionality or otherwise.

[21] We agree with the position taken by the appellant that the amendment does not affect her challenge made under the old unamended version with respect to the impugned word 'offensive' instead of 'grossly offensive' for she could still be charged under the then provision as are many who may have committed an offence under the old unamended version of s 233(1) of the CMA. There is no statute of limitation with respect to a criminal offence and thus the challenge mounted here is not academic on ground of a subsequent amendment to s 233(1) of the CMA after the appellant was charged and the application in the originating summons was first made in the High Court.

Whether the impugned words in s 233 of the CMA are not a permissible restriction under art 10(2)(a) of the FC where a law may be necessary on account of public order

[22] The State through its lawmakers would decide on what acts constitute a penal offence and if it is in the nature of injury to a person or his property, the court would defer to the State which would be in the best position to decide whether to criminalise any act having regard for the need to preserve law and order in society.

[23] Whatever the offence may be and especially when it relates to an individual's freedom to exercise his fundamental liberties under Part II of the FC, the court would have to ascertain if the words prescribing the offence is within the permitted restrictions allowed by the provisions on 'Fundamental Liberties'. No fundamental liberties of a person are absolute and generally there are qualifications. When a criminal legislation is challenged for being unconstitutional for violation of the fundamental liberties guaranteed under

the FC, the court's task as mandated by art 4(1) of the FC would be to review the validity of the impugned legislation to ascertain if the impugned legislation is valid and consistent with the FC.

[24] The courts under art 4(1) of the FC have an inherent function to review and determine the constitutionality of any legislation for what is alleged to be a breach of the fundamental liberties guaranteed under the FC. It is trite that if any law is inconsistent with the FC, such law shall, to the extent of the inconsistency, be void, pursuant to art 4(1) of the FC which reads:

> 4 Supreme law of the Federation
>
> (1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

[25] This position has been affirmed by the Federal Court in *SIS Forum (M) v Kerajaan Negeri Selangor (Majlis Agama Islam Selangor, intervener)* [2022] 2 MLJ 356; [2022] 3 CLJ 339 at para 27. See also *Iki Putra bin Mubarrak v Kerajaan Negeri Selangor & Anor* [2021] 2 MLJ 323; [2021] 3 CLJ 465 (FC) at para 64; and *Rosliza bt Ibrahim v Kerajaan Negeri Selangor & Anor* [2021] 2 MLJ 181 at para 124.

[26] It is also an established principle of statutory interpretation of the constitution that its fundamental liberties guarantees are to be interpreted broadly while any restrictions to those rights must be interpreted narrowly (see: *CCH & Anor (on behalf of themselves and as litigation representatives of one CYM, a child) v Pendaftar Besar bagi Kelahiran dan Kematian, Malaysia* [2022] 1 MLJ 71; [2022] 1 CLJ 1 at para 49 (FC). See also *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301; [2009] 5 CLJ 631 at paras 8 and 13 (FC) and *CTEB & Anor v Ketua Pengarah Pendaftaran Negara, Malaysia & Ors* [2021] 4 MLJ 236; [2021] 6 CLJ 471 at para 122 (FC).

[27] The other aspect to interpreting Part II of the FC is that the court must bear in mind the all-pervading provision of art 8(1) of the FC. The effect of the said provision is to ensure that legislative action is objectively fair. It also houses within it the doctrine of proportionality — the test used when determining whether legislative State action is arbitrary or excessive when it is asserted that a constitutional right is infringed (*Lee Kwan Woh* at paras 1–12; *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333 at paras 18–19, 27–34).

[28] The above principles are important in assessing the constitutionality of the words 'offensive' and 'annoy' contained in s 233 of the CMA.

[29] The effect of making communications which are 'offensive' with the

intention to 'annoy' under s 233 of the CMA an offence is that offensive speech made with the intention to annoy is prohibited as long as it is made over network services.

[30] Contrary to the decision of the High Court, it is not the appellant's case that terms 'offensive' and 'annoy' in s 233 of the CMA are void for vagueness per se as they are not defined in the CMA. Instead, the central question in the appellant's case is whether the words 'offensive' and 'annoy' contained in s 233 of the CMA are consistent with art 10 (freedom of speech, assembly and association) read with art 8 (equality) of the FC. If these words are not, it must be struck down by the courts.

[31] It is obvious that the criminalising of an act in initiating or communicating a message that is offensive with intent to annoy another would be restrictive on one's free speech guaranteed under art 10 which states that:

> 10 *Freedom of speech, assembly and association*
>
> (1) Subject to Clauses (2), (3) and (4) —
>
> (a) every citizen has the right to freedom of speech and expression;
>
> (b) all citizens have the right to assemble peaceably and without arms;
>
> (c) all citizens have the right to form associations.
>
> (2) *Parliament may by law impose —*
>
> (a) *on the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence*;
>
> (b) on the right conferred by paragraph (b) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof or public order;
>
> (c) on the right conferred by paragraph (c) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality.
>
> ... (Emphasis added.)

[32] It is an accepted fact that freedom of speech and expression is not absolute and that there are valid constitutional restrictions permitted under the FC. The FC itself allows for restrictions on grounds categorised in art 10(2)(a) as:

> (a) in the interest of the security of the Federation or any part thereof;

(b) friendly relations with other countries;

(c) public order;

(d) public morality;

(e) restrictions designed to protect the privileges of Parliament or of any Legislative Assembly;

(f) to provide against contempt of court;

(g) defamation; or

(h) incitement to any offence.

[33] It is common ground that the other categories of exceptions are not relevant here except for the category of exception under 'public order'.

[34] The issue is whether the impugned words in s 233 of the CMA and the offence created thereof involving offensive speeches with intent to annoy would be one affecting public order. There may be speeches that is made with the intention to abuse or threaten or incite violence and one would appreciate that these are justified on the ground of preserving public order. The appellant submitted that offensive speech that is made with the intention to annoy would be a separate matter altogether, for it can hardly be a permissible restriction on grounds of public order.

[35] Protection of 'public order' have been used to justify the criminalisation of speech that is obscene, indecent, false, menacing in character with intent to abuse, threaten or harass another person or even to incite violence. Learned counsel for the appellant Malik Imtiaz Sarwar has no quarrel or quibble about that. What is at stake is offensive speech that is made with the intention to annoy which learned counsel submitted would not be a permissible restriction on grounds of public order.

[36] The expressions 'public order' and 'law and order' have a distinct meaning in law and especially in constitutional law. In *Re Application of Tan Boon Liat @ Allen; Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1976] 2 MLJ 83 at p 86, Abdoolcader J held that 'the expression 'public order' is not defined anywhere but danger to human life and safety and the disturbance of public tranquillity must necessarily fall within the purview of the expression'. The court gave various examples of acts affecting public order, namely, black marketing in kerosene oil, opium smuggling, sale of poisonous drugs, and trafficking of drugs. Perhaps with some foresight His Lordship at p 87 of the judgment did mull over whether rumour-mongering would fall within the confines of public order:

> But then black-marketeering is, of course, a far cry from such detrimental activities as trafficking in drugs and say, for example, rumour-mongering in relation to their impact on public order, and I would think that in any event such a case as this might well at least perhaps where essential and controlled commodities are involved be decided differently today in relation to its impact on the maintenance of public order.

[37] The Indian Supreme Court is rich in its jurisprudence on the different gradation and gravity of safety and security of the State and in *Dr Ram Manohar Lohia v State of Bihar and others* AIR 1966 SC 740 at p 758 para 52 it draws a distinction between the terms 'public order', 'security of the State' (known as 'security of the Federation' in Malaysia) and 'law and order' as follows:

> It will thus appear that just as 'public order' in the rulings of this court (earlier cited) was said to comprehend disorders of less gravity than those affecting 'security of State', 'law and order' also comprehends disorders of less gravity than those affecting 'public order'. One has to imagine three concentric circles. Law and order represents the largest circle within which is the next circle representing public order and the smallest circle represents security of State. It is then easy to see that an act may affect law and order but not public order just as an act may affect public order but not security of the State.

[38] Learned counsel for the appellant also drew our attention to another Indian Supreme Court case of *Arun Ghosh v State of West Bengal* AIR 1970 SC 1228 at p 1229 where it expounded further on the difference between 'public order' and 'law and order' as follows:

> 3. ... In *Dr. Ram Manohar Lohia's* case this Court pointed out the difference between maintenance of law and order and its disturbance and the maintenance of public order and its disturbance. *Public order was said to embrace more of the community than law and order. Public order is the even tempo of the life of the community taking the country as a whole or even a specified locality. Disturbance of public order is to be distinguished, from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquillity. It is the degree of disturbance and its effect upon the life of the community in a locality which determines whether the disturbance amounts only to a breach of law and order.* Take for instance, a man stabs another. People may be shocked and even disturbed, but the life of the community keeps moving at an even tempo, however much one may dislike the act. Take another case of a town where there is communal tension. A man stabs a member of the other community. This is an act of a very different sort. Its implications are deeper and it affects the even tempo of life and public order is jeopardized because the repercussions of the act embrace large sections of the community and incite them to make further breaches of the law and order and to subvert the public order. An act by itself is not determinant of its own gravity. In its quality it may not differ from another but in its potentiality it may be very different. Take the case of assault on girls. A guest at a hotel may kiss or make advances to half a dozen chamber maids. He may annoy them and also the management but he does

A not cause disturbance of public order. He may even have a fracas with the friends of one of the girls but even then, it would be a case of breach of law and order only. Take another case of a man who molests women in lonely places. As a result of his activities girls going to colleges and schools are in constant danger and fear. Women going for their ordinary business are afraid of being waylaid and assaulted. The B activity of this man in its essential quality is not different from the act of the other man but in its potentiality and in its effect upon the public tranquillity there is a vast difference. The act of the man who molests the girls in lonely places causes a disturbance in the even tempo of living which is the first requirement of public order. He disturbs the society and the community. His act makes all the women C apprehensive of their honour and he can be said to be causing disturbance of public order and not merely committing individual actions which may be taken note of by the criminal prosecution agencies. It means therefore that the question whether a man has only committed a breach of law and order or has acted in a manner likely to cause a disturbance of the public order is a question of degree and the extent of the reach of the act upon the society. The French distinguish law and order and D public order by designating the latter as order publique. The latter expression has been recognised as meaning something more than ordinary maintenance of law and order. Justice Ramaswami in Writ Petition No. 179 of 1968 drew a line of demarcation between the serious and aggravated forms of breaches of public order which affect the community or endanger the public interest at large from minor E breaches of peace which do not affect the public at large. He drew an analogy between public and private crimes. The analogy is useful but not to be pushed too far. A large number of acts directed against persons or individuals may total up into a breach of public order. In Dr. Ram Manohar Lohia's case examples were given by Sarkar, and Hidayatullah, JJ. They show how similar acts in different contexts affect F differently law and order on the one hand and public order on the other. It is always a question of degree of the harm and its effect upon the community. *The question to ask is: Does it lead to disturbance of the current of life of the community so as to amount to a disturbance of the public order or does it affect merely an individual leaving the tranquility of the society undisturbed? This question has to be faced in every case on facts. There is no formula by which one case can be distinguished from another.* (Emphasis G added.)

[39] One can appreciate that the examples given are more involving physical acts of injury to another in the form of slapping, stabbing or sexually molesting H and even then the actions may not always reach the threshold of affecting 'public order'. When the offence is said to constitute offensive words with intent to annoy another, one may say at most perhaps 'law and order' may have been disrupted. 'Public order' therefore connotes a greater and graver offence more serious than 'law and order' and just below the 'security of the I Federation'.

[40] We were further referred to the Indian Supreme Court in the case of *Collector and District Magistrate v S Sultan* AIR 2008 SC 2096 at p 2098 explained the term 'public order', where Dr Arjit Pasayat J wrote as follows:

> 12. The crucial issue, therefore, is whether the activities of the detune were prejudicial to public order. While the expression 'law and order' is wider in scope in as much as contravention of law always affects order. 'Public order' has a narrower ambit, and public order could be affected by only such contravention which affects the community or the public at large. Public order is the even tempo of life of the community taking the country as a whole or even a specified locality. *The distinction between the areas of 'law and order' and 'public order' is one of the degree and extent of the reach of the act in question on society. It is the potentiality of the act to disturb the even tempo of life of the community which makes it prejudicial to the maintenance of the public order. If a contravention in its effect is confined only to a few individuals directly involved as distinct from a wide spectrum of public, it could raise problem of law and order only*. (Emphasis added.)

[41] It can be seen that 'law and order' and 'public order' can be distinguished and differentiated by reference to the scope, extent and degree of the reach and ripple effects of the act in question. In the former case, confining its effects to only a couple of persons affected. In the latter case, like a conflagration, refusing to be contained, consumes a whole community, causing them to take to the streets or igniting a mass protest that disturbs the even keel of life and disrupts the proper ordering of society as a whole.

[42] The distinction with a difference between 'law and order' and 'public order' in the Indian Supreme Court in *Collector and District Magistrate v S Sultan* AIR 2008 SC 2096 was endorsed by our Federal Court in *Darma Suria bin Risman Saleh v Menteri Dalam Negeri, Malaysia & Ors* [2010] 3 MLJ 307 at p 312 para 8.

[43] Learned counsel for the appellant also underlined the fact that there is nothing in s 233 of the CMA that suggests that 'offensive' or 'annoy' is aimed at preserving public order. In fact, s 233 of the CMA makes no distinction if the communication is made to a person or a group of persons. Further, disruption to public order is not an element of an offence under s 233 of the CMA unlike other statutes.

[44] Two examples were cited for us. One is s 504 of the Penal Code which provides as follows:

> 504 *Intentional insult with intent to provoke a breach of the peace*
>
> Whoever intentionally insults, and thereby gives provocation to any person, intending or knowing it to be likely that such provocation will cause him to break the public peace, or to commit any other offence, shall be punished with imprisonment for a term which may extend to two years or with fine or with both.

[45] Another example was s 505 of the Penal Code which reads as follows:

> 505 *Statements conducing to public mischief*

A Whoever makes, publishes or circulates any statement, rumour or report —

(a) with intent to cause, or which is likely to cause, any officer, soldier, sailor or airman in the Malaysian Armed Forces or any person to whom section 140B refers, to mutiny or otherwise disregard or fail in his duty as such;

B (b) with intent to cause, or which his likely to cause, fear or alarm to the public, or to any section of the public where by any person may be induced to commit an offence against the State or against the public tranquility; or

(c) with intent to incite or which is likely to incite any class or community of persons to commit any offence against any other class or community of

C persons,

shall be punished with imprisonment which may extend to two years or with fine or with both.

D **[46]** Learned counsel for the appellant also referred to s 14 of the Minor Offences Act 1955 as a useful example of a law aimed at preserving public order:

14 Insulting behaviour

Any person who uses any indecent, threatening, abusive or insulting words, or

E behaves in a threatening or insulting manner, or posts up or affixes or exhibits any indecent, threatening, abusive or insulting written paper or drawing with intent to provoke a breach of the peace, or whereby a breach of the peace is likely to be occasioned, shall be liable to a fine not exceeding one hundred ringgit.

F **[47]** There is merit in the appellant's argument that the nexus between the communication and the threat to public order is present in these examples but conspicuously absent in s 233 of the CMA. In fact, the words 'offensive' and 'annoy' are noticeably absent.

G **[48]** It is alarming that the impugned words in s 233 of the CMA made it sufficient for a single communication to a single person that is said to be offensive and made with the intention to annoy to constitute an offence. It could not possibly be imagined that such an offence was created and aimed at preserving public order. It may at most affect 'law and order' but unlike other

H offences involving personal injury to one's body or possession, any restrictions to speech and expression may only be qualified if the offence affects 'public order'.

I **[49]** We are all familiar with the old adage that the truth may hurt and we appreciate that speaking the truth in love is most difficult. There are people who cannot accept the truth, whether it be scientific or historical truths. They may even feel offended and the speech offensive and are annoyed by what is spoken. An offence would have been committed and more so when many police reports are lodged. It is different if what is said is false and fabricated. A

premium should be given to truth and the fact that some truths may be unpalatable does not justify criminalising the messenger merely because some masses of the people do not like the message.

[50] We would be living in a dangerous society if only matters that people love to hear are spoken. In the broad spectrum of a multi-racial and multi-religious society there would be people at the far extreme who would be annoyed by what is considered offensive but no less true. Through the years of living together under a social contract, we develop the attitude of accommodation and we give space for possible annoyance by moving away from the source of it.

[51] The message communicated by the appellant would ordinarily sound the alarm for a full and thorough investigation into what is alleged rather than an attempt to 'shoot the messenger'. If indeed what is spoken is false then the appellant can always be charged for initiating a communication that is 'false with intent to abuse, threaten or harass another'.

[52] Learned counsel for the appellant had a valid point when he submitted that the dictionary definition of 'offensive' and 'annoy' connote triviality which has little or no bearing to public order. As these, two words are not defined in the CMA, resort must be had and reliance placed on the dictionary meaning of 'offensive', that is 'causing someone to feel resentful, upset, or annoyed' (see: *Oxford Learner's Dictionaries*, OUP (n.d.)).

[53] As there is no judicial pronouncement on the exact meaning of 'offensive' in Malaysia, learned counsel for the appellant referred us to the Australian High Court case of *Monis and Another v R* [2013] 4 LRC 732 at p 759 in its interpretation of the term 'offensive' under their s 471.12 of the Australian Criminal Code which is their equivalent of our s 233 of the CMA. It elucidated as follows:

> [56] The ordinary meaning of the word 'offensive' unconstrained by epithets such as 'grossly' is:
>
> (1) Causing offence or displeasure;
>
> (2) Irritating, highly annoying;
>
> (3) Repugnant to the moral sense, good taste or the like, insulting
>
> (See *Macquarie Dictionary* (Rev 3rd Ed, 2001) at 1329.) The *New Shorter Oxford English Dictionary* (1993), Vol 2 at 1983) also adds the terms 'disgusting' and 'nauseous'.
>
> [57] Within the bounds of its ordinary meaning the term 'offensive' used objectively, as it is in s 471.12, covers a range of imputed reactions by one person to the conduct of another. It may describe conduct which would cause transient

displeasure or irritation and also conduct which would engender much more intense responses. In the Court of Criminal Appeal (2011) 256 FLR 28 Bathurst CJ (at [44]) and Allsop P (at [81]–[83]), as discussed earlier in these reasons, construed it as confined to conduct at a threshold defined by the words 'calculated or likely to arouse significant anger, significant resentment, outrage, disgust, or hatred in the mind of a reasonable person in all the circumstances'.

[54] Again, the CMA does not define the word 'annoy' nor is there judicial pronouncements on the term. 'Annoy' is defined by the *Oxford Dictionaries* as 'make (someone) a little angry; irritate' (see: *Oxford Learner's Dictionaries*, OUP (n.d.)).

[55] Whatever the definition of 'offensive' and 'annoy' may be, it is difficult to envisage that an offensive speech with the intention to annoy could be a threat to public order. It is also difficult to envisage that art 10(2)(a) permits restriction to free speech and expression on such trivial grounds. At best, an offensive speech with the intention to annoy would amount to preserving law and order, which is distinct from public order, as explained above.

[56] We were alerted to the Indian Supreme Court in *Shreya Singhal v Union of India* [2015] 3 MLJ 162 which struck down s 66A of its Information Technology Act 2000, which bears similarities with our s 233 of the CMA. The Indian Supreme Court held that s 66A did not fall into any of the permissible restrictions of art 19(2) of the Indian Constitution. That is India's equivalent of our art 10(2)(a). Both India and Malaysia were under the former British rule and when both gained independence, India in 1947 and Malaysia in 1957, our respective Constitutions bear striking similarities with each other in some of the provisions.

[57] The inroads may be made to freedom of speech and expression on ground of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence. As a result, s 66A was held to be inconsistent with art 19 of the Indian Constitution and was struck down. In relation to public order, the Indian Supreme Court held at p 181 of the judgment:

35. This decision lays down the test that has to be formulated in all these cases. We have to ask ourselves the question: does a particular act lead to disturbance of the current life of the community or does it merely affect an individual leaving the tranquility of society undisturbed? Going by this test, it is clear that Section 66A is intended to punish any person who uses the internet to disseminate any information that falls within the sub-clauses of Section 66A. It will be immediately noticed that the recipient of the written word that is sent by the person who is accused of the offence is not of any importance so far as this Section is concerned.

(Save and except where under sub-clause (c) the addressee or recipient is deceived or misled about the origin of a particular message.) It is clear, therefore, that the information that is disseminated may be to one individual or several individuals. *The Section makes no distinction between mass dissemination and dissemination to one person. Further, the Section does not require that such message should have a clear tendency to disrupt public order. Such message need not have any potential which could disturb the community at large. The nexus between the message and action that may be taken based on the message is conspicuously absent — there is no ingredient in this offence of inciting anybody to do anything which a reasonable man would then say would have the tendency of being an immediate threat to public safety or tranquility. On all these counts, it is clear that the Section has no proximate relationship to public order whatsoever. The example of a guest at a hotel 'annoying' girls is telling — this Court has held that mere 'annoyance' need not cause disturbance of public order. Under s 66A, the offence is complete by sending a message for the purpose of causing annoyance, either 'persistently' or otherwise without in any manner impacting public order*. (Emphasis added.)

[58] Granted the present case is confined to offensive speeches made with the intention to annoy and *Shreya*'s case is broader in that it is directed at striking down the entirety of s 66A of the Indian Information Technology Act 2000 and includes terms such as 'menacing' or 'false'. That aside the reasoning by the Indian Supreme Court in *Shreya*'s case is worthy of consideration for our present case.

[59] As 'public order' is the even tempo of the life of the community taking the country as a whole or even a specified locality, it is difficult to imagine how a message disseminated to many which is true may cause a disruption of 'public order'. The truth of a message communicated is subordinated to the feelings and perceptions of a person or a group of persons, who say they have been annoyed. Such an annoyance, quite apart from the fact that it should not be so felt, could not be a threat to 'public order'.

[60] Contrary opinions stated strongly may be offensive to some and may even have a tendency to annoy but unless society provides space for it, we would end up hearing what we love to hear irrespective of the truth or falsity of what we hear. Learned counsel for the appellant cautioned that any insults, vulgarity, or rude exchanges could be an offence under s 233 of the CMA because of the presence of the words 'offensive' and 'annoy'. Likewise, discussions or advocacy of a particular point of view which is of educational, literary, or scientific value but may be offensive or annoying could also be an offence. Culturally and universally, every language in the world has its catalogue of insulting, vulgar and rude words. In the social intercourse and heated exchange of words certain expressions may be offensive and annoying to some. Generally, an apology would settle the matter or the offended one would move away from the source of the annoyance. These are the types of speech that

occurs in everyday life in the rough and tumble of it all amidst its stress and strife. Prima facie, this is inconsistent with art 10(1)(a) of the FC.

[61] Unlike defamation, the truth of the message as in the defence of justification, is not a valid defence for one charged under s 233(1) of the CMA for initiating a communication of a message which is offensive with intent to annoy another, much less the defence of fair comment or qualified privilege.

[62] The learned SFC submitted that the transmission of 'offensive' content by post has been an offence since the Post Office Act 1947 (s 28) and the Postal Services Act 1991 (s 18). Surely the learned SFC is not suggesting that a long-standing statute has attained a status of immutability and indeed immunity from constitutional challenge just because it has remained intact in the statute book for a good many years. Our Federal Court very recently in *Lai Hen Beng v Public Prosecutor* [2024] 1 MLJ 225; [2024] 1 CLJ 681, struck down and judicially repealed the offence of enticing or taking away a married woman from her husband with intent of having an affair with her under s 498 of the Penal Code as being unconstitutional for being in violation of the principle of equality under art 8 of the FC. It was a pre-Merdeka law that has been in the Penal Code for as long as we can remember.

[63] The learned SFC also drew our attention to 'causing annoyance' as an elect of several offences in the Penal Code, such as public nuisance (s 268), obscene songs (s 294), and misconduct in public by a drunken person (s 510). It must be remembered that 'public nuisance' also involves the element of causing injury, obstruction, danger or annoyance to persons who may have occasion to use any public right and not a case of mere 'offensive' words which one can move away from and so not hear or read. As for 'obscene songs' we understand the appellant is not challenging the constitutionality of 'obscene' communications under s 233(1) of the CMA. With respect to the offence under s 510 of the Penal Code the person must first be in a state of intoxication and one can imagine the injury that may be potentially caused when in such a state.

[64] The learned SFC's analogy with such offences under the Penal Code as dishonestly making a false claim before a court (s 209), assault (s 351), criminal trespass (s 441), and false information with intent to cause a public servant to use his lawful power to the injury of another person (s 182) are all misplaced for these offences involve the element of falsehood (s 209 and s 182) or assault (s 351) or with intent to commit an offence (s 441).

[65] We accept the fact that the freedom of expression under art 10(1)(a) of the FC is not a license for one to spread a false message or to perpetrate a lie. Neither can it be a justification for spreading falsehood. Justice Oliver Wendell

Holmes Jr of the US Supreme Court in *Schenck v United States* (1919) 249 US 47 famously said at p 52: A

> The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.

B

[66] An offensive communication with intent to annoy cannot be affecting 'public order' and the criminalising of such an act would be an overreach by the State that guarantees freedom of expression subject only to certain limited restrictions which restriction on 'public order' does not apply here.

C

[67] Not coming within the permitted restriction would render the law making such an 'offensive' communication with intent to 'annoy' unconstitutional.

D

Whether the impugned words in s 233 of the CMA are not a restriction which is in pursuance of a legitimate aim as required under art 10(2)(a) of the FC read with art 8 of the FC

[68] This question requires a consideration of what is the aim of s 233 of the CMA in prohibiting offensive speeches made with the intention to annoy? The intent and object of s 233 of the CMA, gathered from a proper construction of the impugned provision, seems to be to regulate the civility of the discourse over the internet. The legislative intent may be gathered from the language used in the text of the legislation. See the case of *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27.

E

F

[69] The Federal Court in *Sivarasa Rasiah* embraced the important principle that the restriction of fundamental liberties must have an objective that is sufficiently important to justify and that such restriction is proportionate to the objective it seeks to achieve at p 526 as follows:

G

> [28] Although there are a number of cases on what is meant by arbitrary state action, the most authoritative is the judgment of Gubbay CJ in *Nyambirai v National Social Security Authority and Another* [1996] 1 LRC 64 which was approved by the Privy Council in *Elloy de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing & Others* [1999] 1 AC 69; [1998] UKPC 30. Lord Clyde when delivering the judgment of the Board said:
>
> > In determining whether a limitation is arbitrary or excessive he (Gubbay CJ) said that the court would ask itself:
> >
> > > whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.

H

I

Their Lordships accept and adopt this threefold analysis of the relevant criteria.

[29] In *R v Secretary of State for the Home Department, ex parte Daly* [2001] UKHL 26, Lord Steyn adopted what was said in *de Freitas*:

> The contours of the principle of proportionality are familiar. In *Elloy de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing & Others* [1999] 1 AC 69; [1998] UKPC 30 the Privy Council adopted a three stage test. Lord Clyde observed, at p 80, that in determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself:
>
> > whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.
>
> [30] It will be seen from a reading of the speech of Lord Steyn in *Daly* that the threefold test is applicable not only to test the validity of legislation but also executive and administrative acts of the state. In other words, all forms of state action — whether legislative or executive — that infringe a fundamental right must (a) have an objective that is sufficiently important to justify limiting the right in question; (b) the measures designed by the relevant state action to meet its objective must have a rational nexus with that objective; and (c) the means used by the relevant state action to infringe the right asserted must be proportionate to the object it seeks to achieve.

[70] The Court of Appeal in *Nik Nazmi bin Nik Ahmad v Public Prosecutor* [2014] 4 MLJ 157 explained that there must be a rational nexus between the restriction and the objective:

> [110] Under the proportionality concept expounded in *Sivarasa Rasiah*'s case it must be borne in mind that the restriction must have an objective that is sufficiently important to justify limiting the right in question; there must be a rational nexus between the restriction and the objective and the means used by the authorities must be proportionate to the objective.

[71] There are merits in the appellant's argument that criminalising offensive speech with the intent to annoy has no rational nexus to the aim of regulating the civility of the discourse because it wrongly assumes that society has a uniform standard in determining what is offensive.

[72] It is only too obvious that in a diverse society made up of different races, religions, persuasions what is offensive to a particular person may not be for others. There is a broad spectrum of views on every subject from abortion to apostasy and from quotas to qualifications, pensions to patriotism and the like.

[73] Section 233 of the CMA does not provide any standards as to what

amounts to offensive or what would amount to an intent to annoy. When all types of speeches could potentially be offensive if a single person finds it so then freedom of speech has become illusory and enforcement becomes arbitrary. Every speech would have to be sanitised irrespective of its truth so as not to attract the sanction of s 233(1).

[74] Human problem of free speech and government is the same everywhere with the difference in degree and extent. The United States Supreme Court in addressing this problem in the case of *Cohen v California* (1971) 403 US 15 expressed its majority opinion through Harlan J as follows at p 25:

> How is one to distinguish this from any other offensive word? *Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us*. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment below. For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, *it is nevertheless often true that one man's vulgarity is another's lyric*. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that *the Constitution leaves matters of taste and style so largely to the individual*.

[75] With no objective standard, regulating the civility of discourse over the internet becomes a euphemism for policing and censorship of undesirable speeches by the authorities with the resulting chilling effect over freedom of speech and expression enshrined under art 10(1)(a) of the FC.

[76] The object and purpose or the objectives of the CMA can be found in s 3 of the CMA as follows:

> 3 Objects
>
> (1) The objects of this Act are —
>
> (a) to promote national policy objectives for the communications and multimedia industry;
>
> (b) to establish a licensing and regulatory framework in support of national policy objectives for the communications and multimedia industry;
>
> (c) to establish the powers and functions for the Malaysian Communications and Multimedia Commission; and
>
> (d) to establish the powers and procedures for the administration of this Act.
>
> (2) The national policy objectives for the communications and multimedia industry are —
>
> (a) *to establish Malaysia as a major global centre and hub for communications and multimedia information and content services*;
>
> (b) to promote a civil society where information-based services will provide the basis of continuing enhancements to quality of work and life;

(c) to grow and nurture local information resources and cultural representation that facilitate the national identity and global diversity;

(d) to regulate for the long-term benefit of the end user;

(e) to promote a high level of consumer confidence in service delivery from the industry;

(f) to ensure an equitable provision of affordable services over ubiquitous national infrastructure;

(g) *to create a robust applications environment for end users*;

(h) to facilitate the efficient allocation of resources such as skilled labour, capital, knowledge and national assets;

(i) to promote the development of capabilities and skills within Malaysia's convergence industries; and

(j) to ensure information security and network reliability and integrity.

(3) Nothing in this Act shall be construed as permitting the censorship of the Internet.

[77] Criminalising offensive speech does not have any rational nexus with any of the objectives of CMA and would hindrance rather than a help namely: (a) to establish Malaysia as a major global centre and hub for communications and multimedia information and content services, and (b) to create a robust applications environment for end users.

[78] Criminalising offensive speech made with the intent to annoy effectively permits the authorities to censor the internet from speech which certain quarters do not agree with just because of the sensitivities of some segments of society. This would derogate from the proclaimed promise and guarantee that 'nothing in this Act shall be construed as permitting the censorship of the internet' under s 3(3) of the CMA.

[79] The Court of Appeal in *Nik Nazmi bin Nik Ahmad v Public Prosecutor* [2014] 4 MLJ 157 held that restrictions to fundamental liberties must serve a legitimate aim that is recognised by the FC. The Court of Appeal struck down s 9(5) of the Peaceful Assembly Act 2012 and in doing so observed that:

> [140] ... The court needs to balance whether the restrictions imposed on the constitutionally guaranteed freedoms are proportionate to the legitimate aims as set out in the constitution. The test is one of legitimate aim and nothing less. Support for the jurisprudence wholly or partly and/or in composite can be found in a number of decisions of the Indian Supreme Court and also case laws of other jurisdictions which do not subscribe to authoritarian rule.

[80] While civility of discourse over the internet would be ideal, the lack of it is not inimical nor injurious to society justifying policing 'offensive' speech with intent to 'annoy'. We agree with learned counsel for the appellant that there are already a host of offences created in criminalising communications which are 'obscene, indecent, false, menacing with intent to abuse, threaten or harass' another, for these may reasonably affect 'public order' if not contained.

[81] To venture outside the grounds recognised under art 10(2)(a) of the FC to regulate and restrain speech would not be a legitimate aim. It would have a chilling effect on free speech which value all democratic societies appreciate as the cornerstone of all other fundamental liberties. Absent that freedom, all other human rights would be at risks.

[82] It was observed in the United States Supreme Court case of *Cohen v California* at pp 24–45 that:

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests. See *Whitney v California* (1927) 274 US 357, pp 375–377 (Brandeis J, concurring).
>
> To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated ...

[83] Article 8 of the FC, encapsulates the concept of equality before the law and the equal protection of the law. The Article enjoins that all actions of the State in restricting a fundamental right whether via legislative or executive action must be fair and not arbitrary or excessive. Article 8 of the FC guarantees as follows:

> 8 Equality
>
> (1) All persons are equal before the law and entitled to the equal protection of the law.
>
> ...

[84] See: *Lee Kwan Woh* at paras 1–12; *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213 at paras 8 and 15.

[85] The proportionality test in *Sivarasa Rasiah* has become entrenched with consistent approval in subsequent cases by the Federal Court in *Public Prosecutor v Azmi bin Sharom* [2015] 6 MLJ 751 at p 770 at para 41–43 and a nine-judges bench of the Federal Court in the case of *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1 at pp 37–38; [2019] 5 CLJ 780 at pp 824 paras 117–120.

[86] Even more recently the Federal Court in *Ketheeswaran a/l Kanagaratnam & Anor v Public Prosecutor* [2024] 1 MLJ 851; [2024] 2 CLJ 341 as follows:

> [133] In relation to the second element, more recent cases decided in the past few decades such as *Alma Nudo*, also *emphasise the importance of proportionality in the assessment of the measure. In other words, even if the Legislative measure which is discriminatory was pursued for a legitimate aim, the measure may still be violative of art 8(1) if the extent of the measure taken is disproportionate to the legitimate Legislative aim it seeks to achieve*. (Emphasis added.)

[87] In *Lai Hen Beng v Public Prosecutor*, the Federal Court reiterated as follows:

> [13] Firstly, it must be shown that the discrimination is founded on an intelligible differentia distinguishing between persons that can be grouped together from others left out of the group. Secondly, the differentiation must have a rational relation to the object sought to be achieved by the impugned law. The classification may be founded on different bases such as geography, or according to objects or occupations and the like. What is necessary is that there must be a nexus between the basis of the classification and the object of the law in question.
>
> [14] *In the relatively recent judgment of this court in Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1; [2019] 5 CLJ 780 *('Alma Nudo'), this court also emphasised the importance of the test of proportionality which is housed in art 8(1) read with art 5(1). In other words, not only must there be a nexus between the impugned Legislative measure and the legitimate Legislative aim, but the measure itself (which infringes upon a fundamental right) must itself be proportionate to the legitimate Legislative objective. If it does not meet the test of reasonable classification or meets it but fails to have any nexus to any legitimate Legislative aim, then the impugned provision/act runs afoul of art 8(1) and is liable to be dealt with either under arts 4(1) or 162, as the case may be.*
>
> ...
>
> [23] We have explained this above but for clarity, it bears further explanation as follows. Article 8(1) is the all-encompassing provision on equality in *that all persons are equal before the law and are entitled to the equal protection of the law. In this sense, clearly discernible persons or classes of persons can be differentiated and discriminated against provided that the discrimination bears a reasonable nexus to a legitimate aim (see Harun — Federal Court) and provided that the measure itself is proportionate to the said Legislative objective it serves (see Alma Nudo).* (Emphasis added.)

[88] In the present case, s 233 of the CMA in criminalising offensive speech with the intent to annoy cannot be said to have a rational connection to the legitimate aim of regulating the civility of the discourse. Aberrations in the way some people speak may not reflect well on their upbringing but to punish them for having communicated such a message would be to throw the baby out together with the bath water. Words more than denote appealing to the mind, it connotes and emotes in appealing to the heart.

[89] Indeed, in reading the Annexure to the charge with respect to the contents of the information, one finds expressed in the language of anxious concern what is happening in the immigration detention centre and with that a call to action. It behooved the authorities to investigate into the truth or otherwise of the message and if true, such a message cannot be offensive with intent to annoy.

[90] If found to be false, there is already the offence of communicating a false message with intent to abuse or harass another for which the appellant may be charged. If truth is offensive and annoying we fear the danger of ending up by rewarding opacity and cover-up rather than promoting transparency and accountability.

Whether the impugned words in s 233 of the CMA are not a restriction that is proportionate to a legitimate aim under art 10(2)(a) of the FC read with art 8 of the FC

[91] Learned counsel for the appellant submitted that even assuming for a moment that there is a legitimate aim to the criminalisation of offensive speech made with the intention to annoy under s 233, the restrictions must still be proportionate to the objective to be achieved by the CMA.

[92] We can appreciate the submission of learned counsel for the appellant that the impugned words in s 233 of the CMA criminalises a broad range of everyday speech with no available defence or exception to an offence under s 233 of the CMA. All it takes is for a person or a group of persons to make a police report that the words communicated through some social media are offensive to them and that they had been annoyed by the words used. An investigation paper would have to be opened and depending on the pressure exerted on the decision maker to prefer a charge, the person making that communication may well be slapped with a charge under s 233 of the CMA of the for making an offensive communication with intent to annoy.

[93] One may hope that sensibilities will prevail over sensitivities but then again, the real prospect of being charged is enough to deter free speech on pain of suffering the penalty of imprisonment up to one year and a fine up to

RM50,000 or both. The impugned words may not have caused any harm other than annoyance and yet the punishment of a term of imprisonment coupled with such a hefty fine for offensive speech made with the intention to annoy may be visited upon a person convicted of such an offence. That would be disproportionate to the legislative aim of the CMA.

[94] Learned counsel for the appellant was perhaps saying the obvious in observing that causing offence with the intention to annoy is something that happens in everyday life. It would not be an over exaggeration to say that all it takes for a person to be jailed is for one 'victim' to be offended. It is disproportionate to jail a person simply for wanting to annoy another person.

[95] What is more disturbing is that there appears to be no defence or exceptions available to a person making offensive speech with the intention to annoy. Given the dictionary definition of 'offensive', a person could commit an offence under s 233 of the CMA even if the person is speaking the truth because the test of whether a speech is offensive is whether a person feels offended and not whether the speech is true. What is needed is not to water down the truth or to mellow it but to rather to work on the offended so as to help him mature to accepting the truth. A factually accurate speech could still be offensive. Should we then seal our lips forever or ignore it altogether as sweeping it under the carpet for fear that it would be too sensitive to some segments of society?

[96] It is said that the first step in solving a problem is to recognise the problem and that recognition cannot begin if people are discouraged to speak truths that may be regarded as offensive to some people. Until we confront the truth, no change can be effected in society and for as long as we continue to live the lie we would be deluding ourselves or postponing the problem.

[97] Speeches, writings and communications are part and parcel of the space that democratic states guarantee their citizens so that in the contestations of ideas and thoughts, we may have the courage to change the things we can no longer accept, the grace to accept the things we cannot change and the wisdom to discern one from the other.

[98] One can recall how in the west slavery was abolished and women were allowed to vote when the powers that be were offended by such demands when initially made. Speech once thought as offensive and annoying to some may create an awareness and even an awakening that augers well for the society as a whole when founded upon truths that have long been ignored and silenced for fear of offending others.

[99] The Australian High Court on *Monis and Another v R* was even more

explicit, making no apology for speeches that may be offensive in the course of a debate and discussion on a divisive issue when it observed as follows:

> [220] ... *The elimination of communications giving offence, even serious offence, without more is not a legitimate object or end. Political debate and discourse is not, and cannot be, free from passion. It is not, and cannot be, free from appeals to the emotions as well as to reason. It is not, and cannot be, free from insult and invective.* Giving and taking offence are inevitable consequences of political debate and discourse. Neither the giving nor the consequent taking of offence can be eliminated without radically altering the way in which political debate and discourse is and must be continued if 'the people' referred to in ss 7 and 24 of the Constitution are to play their proper part in the constitutionally prescribed system of government. (Emphasis added.)

[100] In the same Australian apex court's decision in *Monis and Another v R*, it was also observed that:

> [85] History, not only recent history, teaches that abuse and invective are an inevitable part of political discourse. Abuse and invective are designed to drive a point home by inflicting the pain of humiliation and insult. And the greater the humiliation, the greater the insult, the more effective the attack may be. The giving of really serious offence is neither incidental nor accidental. The communication is designed and intended to cause the greatest possible offence to its target no matter whether that target is a person, a group, a government or an opposition or a particular political policy or proposal and those who propound it. And any reasonable person would conclude that not only is that the purpose of what was said, its purpose has been achieved.

[101] Our Federal Court in *Amir Hariri bin Abd Hadi v Public Prosecutor* [2025] 4 MLJ 807, in finding that the restriction in the need to give notice under s 9(5) of the Peaceful Assembly Act 2012 ('the PAA') was unconstitutional explained the application of the proportionality principle housed in art 8 of the FC as follows:

> [64] In explaining our reasons, we find that sub-s 9(5) is a discriminatory restriction that disproportionately curtails the right to the freedom of peaceful assembly guaranteed by art 10(1)(b).
>
> [65] We accept that the PAA 2012 was passed with the express and implied intention of preserving the right to peaceful assembly guaranteed by art 10(1)(b). However, in this equation, it does not appear to us that sub-s 9(5) when read with sub-s 9(1) is, when considered in totality, consistent with that noble intention.
>
> [66] If sub-s 9(5), as the respondent suggests, is to ensure that the police are notified of any upcoming assemblies so that they can be on guard to take protective action, then such an intention is clearly not manifest in the way it is couched. For one, we agree with the applicant that it imposes a separate and onerous duty on the organiser of the assembly to provide notice quite apart from the nature of the assembly.
>
> [67] In other words, an organiser, whomever that person is and who fails to give notice of an assembly can be charged with and convicted of an offence under

A sub-s 9(5) even if the assembly takes place and ends peacefully. This offence discriminates the organiser against the gatherers of his or her assembly who commit no offence while the organiser is guilty of one.

[68] In this regard, we cannot agree with the respondent that sub-s 9(5) simply seeks to incentivise or strictly enforce the notice requirement in sub-s 9(1) to protect,
B preserve, or balance on the one side public order and security and on the other, the constitutional right to assemble peaceably. In other words, the respondent's reading of sub-s 9(5) is only valid if we adopt a myopic view of that subsection and ignore the rest of its legal implications and overall chilling effects on an otherwise valid legal right to assembly peaceably and without arms.

C

[102] To silence speech that is true just because some may find it offensive and annoying would be to use a sledgehammer to a kill a fly. It is disturbingly disproportionate to what it seeks to achieve in a civil discourse supposedly prized in a peaceful and placid ordering of society. That would be a peace, of the
D cemetery and not the peace amidst the contestations of views and thoughts in the marketplace of ideas.

Whether the impugned words of s 233 CMA amount to a prohibition and not a restriction under art 10(2)(a) of the FC read with art 8 of the FC

E

[103] The broad sweep of s 233 of the CMA is such that there are no exceptions to an offensive speech even if it be true. While a civil defence is available on ground of justification, fair comment or qualified privilege in a cause of action that needs only to be proved on the balance of probabilities, yet
F the same communication would constitute a criminal offence with no available defence though the prosecution would have to prove beyond reasonable doubt.

[104] In a case where the author of the offensive speech does not dispute being the maker of the communication, the prosecution would have proved its case
G beyond a reasonable doubt based on the testimonies of the witnesses that had lodged a police report stating they had been annoyed by the communication that to them was offensive. Learned counsel made the point that this would create an irrational state of affair where a person who has made an offensive speech against another would be able to successfully defend himself in a civil
H defamation claim but would nevertheless be guilty of an offence under a 233 of the CMA. An entire category of speech that is offensive in character is completely prohibited by the impugned words in s 233 of the CMA, criminalising in its wake both protected as well as permitted or innocent speeches.

I

[105] The Australian High Court case of *Monis and Another v R* had recognised such an incoherence in its s 471.12 of the Australian Criminal Code (Australia's equivalent of s 233 of the CMA which prohibits offensive speech) and held categorically as follows:

[213] *To hold that a person publishing defamatory matter could be guilty of an offence under s 471.12 but have a defence to an action for defamation is not and cannot be right*. The resulting incoherence in the law demonstrates either that the object or end pursued by s 471.12 is not legitimate, or that the section is not reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of government and the freedom of communication that is its indispensable incident. *The incoherence is not removed, and its consequences cannot be avoided, by leaving a jury to decide whether reasonable persons would regard the use, in all the circumstances, as offensive.* In the case postulated, the user of the service both knows that the communication is, and intends that the communication be, offensive. And there is no basis for the proposition (advanced by the second respondent and Queensland) that a jury would not find an accused guilty of an offence against s 471.12 in circumstances of the kind now under consideration because of the section's reference to 'reasonable persons ... in all the circumstances'. Statements that are political in nature and reasonable for a defendant to make can and often will still bite in the sense relevant to s 471.12. *A statement can still be offensive even if it is true* (cf *Patrick v Cobain* [1993] 1 VR 290 at p 294).

[214] The better view is that the object or end pursued by s 471.12 is not a legitimate object or end. Preventing use of a postal or similar service in a way that is offensive does no more than regulate the civility of discourse carried on by using such a service. *Coleman v Power established that promoting civility of discourse is not a legitimate object or end.* (Emphasis added.)

[106] Lest it be said that the judicial opinion expressed was in the context of a country with a more mature democracy, we have even in our Malay proverb an expression like 'Siapa makan cili, dia yang terasa pedas!' which transliterated means 'Whoever has eaten the chilis would feel its hot spiciness!'

[107] Our Federal Court has been astute in discerning a prohibition of what may ostensibly appear disguised as a reasonable restriction in the recent case of *Amir Hariri* as follows:

[71] By stark contrast, a 'prohibition' is a total denial of a given right. So, for instance, a prohibition against the right to assemble peaceably would entail a measure that completely denies any person from performing that act whatsoever.

[72] In this regard, sub-s 9(5) bears several implications that matches it as a prohibition. The first real legal effect of that subsection is that no person is entitled to organise a peaceful assembly unless he or she first provides notice under sub-s 9(1) for otherwise they are liable to a criminal sanction. This includes urgent assemblies that could not otherwise be held within a number of days less than the notice period. While people who attend the said assembly can suffer no criminal action for attending without notice, the organiser (whoever that might be) remains liable to a criminal charge. The result is a chilling effect on all organisers who are discouraged from ever organising such assemblies for fear of prosecution for a lack of notice.

A [73] The overall result produced from such a conclusion is that the Parliamentary intent here appears to be that assemblies cannot ever be held in such a situation due to the imposssibilites of being able to give any notice of it. *This complete denial of the right to assemble is clearly not a restriction but a disguised prohibition.* (Emphasis added.)

B

[108] We agree with the appellant that the determination by the Legislature of what constitutes a restriction is not final or conclusive. The court's role is not that of a language teacher trying to find the meaning of words used in a matter touching upon fundamental liberties but rather as the guardian of the C fundamental rights guaranteed by the Constitution, it examines to see if a restriction has in reality rendered that right illusory in that it is in effect a prohibition. In exercising its function, it has the power to set aside an Act of the Legislature that is in violation of the freedoms guaranteed by the Constitution.

D See: *Chintaman Rao v The State of Madhya Pradeshram* [1950] SCR 759 at p 765.

[109] We follow the salutary approach laid down in *Pendakwa Raya v Cheah Beng Poh & Ors* [1984] 2 MLJ 225 at p 226; [1984] 2 CLJ Rep 383 at p 385 E where it was said:

> The court as guardian of the rights and liberties enshrined in the constitution is always jealous of any attempt to tamper with rights and liberties. But the right in issue here ie the right to assemble peaceably without arms is not absolute for the Constitution allows Parliament to impose by law such restrictions as it deems F necessary in the interest of security and public order. *In my view, what the court must ensure is only that any such restrictions may not amount to a total prohibition of the basic right so as to nullify or render meaningless the right guaranteed by the Constitution.* (Emphasis added.)

G **[110]** The focus of the State should be whether what is contained in the so-called offensive content is true or false. If it is true than the Immigration Department ought to buckle up and serious look into its standard operating procedure to ensure that the Covid virus does not spread like wild fire among the detainees. It is a humanitarian concern irrespective of the reasons for H entering illegally in the country or entering legally and overstaying illegally. If the content is false there are actions that could be taken under s 233(1) of the CMA for communicating a message that is false with intent to abuse or harass another.

I **[111]** We appreciate that there is a presumption, even a strong presumption of the constitutional validity of any impugned provision of the law that is being challenged as was held in *Public Prosecutor v Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116 and the burden of proof lies on the party seeking to establish the contrary. However, for the reasons given above, we are more than satisfied

that the burden of proof has been discharged.

[112] Irrespective of the particular facts of this case, criminalising speeches that may be offensive and annoying would be disproportionate to the objective of promoting a civil discourse of any matter when there are already more than enough offences to charge a person for disseminating via electronic means a false or menacing message with intent to abuse, threaten or harass another.

Whether the impugned words in s 233 of the CMA are consistent with Malaysia's obligations under international law

[113] As part of the international community, Malaysia has incorporated the human rights protected under the United Nations' Universal Declaration of Human Rights 1948 ('the UDHR') into our corpus of law for so long as these rights are not inconsistent with our FC. When the Malaysian Human Rights Commission was established under the Human Rights Commission of Malaysia Act 1999 for the protection and promotion of human rights in Malaysia, our Parliament specifically singled out the UDHR as our guidepost by providing in s 4(4) of the Act as follows:

> For the purpose of this Act, regard shall be had to the Universal Declaration of Human Rights 1948 to the extent that it is not inconsistent with the Federal Constitution.

[114] Our Malaysian courts, consistent with our international commitments, would where relevant refer to the UDHR as both an aspirational as well as a foundational document spelling out the basic human rights of all persons by virtue of being human and derived from the inherent dignity of the human person. In the Court of Appeal's decision in *Subramaniam a/l Letchimanan v The United States of America and another appeal* [2021] 5 MLJ 612, it was observed as follows:

> [72] We understand that *where fundamental liberties and human rights are concerned the courts are more prepared to take a robust approach in incorporating international human rights norms into the domestic law* even though a particular Convention has not been ratified or incorporated into domestic law by legislation.
>
> [73] Our courts *tend to be more flexible if the Convention to which we are not a party yet nevertheless promotes principle of fundamental liberties enshrined in our Federal Constitution and the Rule of Law or that it is embodied in the United Nation Universal Declaration of Human Rights ('UDHR') which values are not inconsistent with our Federal Constitution.* (Emphasis added.)

[115] Article 19 of the UDHR states as follows:

> Article 19
>
> *Everyone has the right to freedom of opinion and expression*; this right include freedom

to hold opinions without interference and *to seek, receive and impart information and ideas through any media and regardless of frontiers*. (Emphasis added.)

[116] We cannot see how article 19 of the UDHR is inconsistent with our FC which guarantees the same freedom under art 10(1)(a) of the FC. In fact, in the Recital to the adoption of the ASEAN Declaration of Human Rights ('the ADHR') dated 18 November 2012, Malaysia together with the other ASEAN Member States reiterated as follows:

> REITERATING ASEAN and its Member States' *commitment to the Charter of the United Nations, the Universal Declaration of Human Rights*, the Vienna Declaration and Programme of Action, and other international human rights instruments to which ASEAN Member States are parties as well as to relevant ASEAN declarations pertaining to human rights; (Emphasis added.)

[117] In adopting the ADHR, Malaysia further reaffirmed as follows:

> 3 REAFFIRM further our *commitment to ensure that the implementation of the AHRD be in accordance with our commitment to the Charter of the United Nations, the Universal Declaration of Human Rights*, the Vienna Declaration and Programme of Action, and other international human rights instruments to which ASEAN Member States are parties, as well as to relevant ASEAN declarations and instruments pertaining to human rights. (Emphasis added.)

[118] General Principle No 23 of the ADHR reads as follows:

> Every person has *the right to freedom of opinion and expression*, including freedom to hold opinions without interference and *to seek, receive and impart information, whether orally, in writing or through any other medium of that person's choice*. (Emphasis added.)

[119] Having reiterated and reaffirmed our commitment to the UDHR when adopting the ADHR, we cannot now be renegading and resiling from it and more so when the rubber meets the road. Learned counsel, Lim Wei Jiet, holding a watching brief for Suara Rakyat Malaysia ('SUARAM'), a Malaysian Human Rights organisation, highlighted that the Malaysian courts have in various instances referred to the UDHR and the International Covenant on Civil and Political Rights ('ICCPR') in assessing the constitutionality of domestic law such as in the Court of Appeal cases of *Mat Shuhaimi bin Shafiei v Public Prosecutor* [2014] 2 MLJ 145 at para [88], *Muhammad Hilman bin Idham & Ors v Kerajaan Malaysia & Ors* [2011] 6 MLJ 507 at para [55] and in the High Court case of *Chong Ton Sin (t/a Gerakbudaya Enterprise) & Anor v Menteri Dalam Negeri & Anor* [2023] 7 MLJ 118 at para [38].

[120] Such an approach has been espoused by Justice Michael Kirby who when as the President of the Court of Appeal of New South Wales (as he then was), wrote in 'The Australian Use of International Human Rights Norms:

From Bangalore to Balliol — A View from the Antipodes' (1993) 16 UNSWLJ 363 at p 366, to explain regarding what has now come to be popularly referred to as the 'Bangalore Principles on the Domestic Application of International Human Rights Norms':

> But the truly important principles enunciated at Bangalore asserted that *fundamental human rights were inherent in human kind and that they provide 'important guidance' in cases concerning basic rights and freedoms from which judges and lawyers could draw for jurisprudence of practical relevance and value.*
>
> The Bangalore Principles acknowledged that in most countries of the common law such international rules are not directly enforceable unless expressly incorporated into domestic law by legislation. But they went on to make these important statements:
>
> > There is a *growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law — whether constitutional, statute or common law — is uncertain or incomplete;*
>
> It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes — whether or not they been incorporated into domestic law — for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law. (Emphasis added.)

[121] The above approach can be traced back to the dicta of Lord Atkin in *Chung Chi Cheung v R* [1939] AC 160 at p 168, who when speaking for the Privy Council said this:

> ... It must be always remembered that so far at any rate as the courts of this country are concerned international law has no validity save in so far as its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rules upon our own code of substantive law or procedure. The courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and having found it they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals.

[122] The Malaysian Human Rights Commission ('SUHAKAM') tasked with advising and assisting the Government on protecting and promoting human rights in Malaysia and in recommending to the Government with regard to the subscription or accession of treaties and other international instruments in the field of human rights under s 4(1) of the Human Rights Commission of Malaysia Act 1999, issued the following statement in conjunction with the High-Level Panel on the 50th Anniversary of Human Rights Covenants and the 31st Session of the Human Rights Council Palais des Nations, Geneva, March 2016 as follows:

> The Human Rights Commission of Malaysia (SUHAKAM) is delighted to join the Human Rights Council in commemorating the fiftieth anniversary of the two International Covenants on Human Rights, namely the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. The implementation of the provisions contained in these Covenants is instrumental towards to ensuring the full and equal enjoyment of human rights by the people.
>
> While Malaysia has yet to accede to ICESCR and ICCPR, the Commission notes that the Malaysian Government has established a Technical Sub-Committee to study the feasibility of becoming party to several international human rights treaties including ICCPR and ICESCR. The Technical Sub-Committee was expected to conclude its study by 2013 and put forth its recommendations regarding Malaysia's accession to ICESCR.
>
> The Commission also acknowledges that the Government has carried out numerous initiatives and programmes over the years under a range of national plans and policies, which have resulted in commendable economic and social progress especially in areas relating to poverty eradication, healthcare and education, among many others. Given the Government's continuous efforts in these areas, the Commission is of the view that accession to ICESCR is timely and will reaffirm the Government's commitment in promoting and protecting economic, social and cultural rights.
>
> Against this backdrop, *the Commission urges the Government to expedite the process of becoming party to ICESCR as well as the other remaining core international human rights treaties in order to provide an enabling environment for human rights and fundamental freedoms to be fully respected, protected and fulfilled.* (Emphasis added.)

[123] Article 19 of the International Covenant on Civil and Political Rights ('ICCPR') itself acknowledges that freedom of expression is not absolute and that it is subject to certain permissible restrictions that we have discussed above. It reads:

> 1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> 3. *The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*
>
> (a) *For respect of the rights or reputations of others;*
>
> (b) *For the protection of national security or of public order (order public), or of public health or morals*. (Emphasis added.)

[124] SUHAKAM in its '2021–2025 Strategic Plan' at p 17 persevered and

said:

> SUHAKAM will continue to advocate for ... the accession to the remaining 6 treaties which are:
>
> (i) International Convention on the Elimination of All Forms of Racial Discrimination (ICERD);
>
> (ii) *International Covenant on Civil and Political Rights (ICCPR)*;
>
> (iii) International Covenant on Economic, Social and Cultural Rights (ICESCR);
>
> (iv) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT);
>
> (v) International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW);
>
> (vi) International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED). (Emphasis added.)

[125] It was the American civil rights advocate Frederick Douglass who underlined the fact that: 'To suppress free speech is a double wrong. It violates the rights of the hearer as well as those of the speaker'. This vital concept of the right 'to seek, receive and impart information' has now been incorporated into article 19 of the UDHR and ICCPR and General Principle 23 of the ADHR.

[126] If the right of freedom of expression is merely aspirational and not available to all and sundry then we must spare no efforts to create a culture of the free flow of information and not of fear. It is when the light of truth is brought to bear on what is said to be 'offensive' and 'annoy' that we begin to see things as they are in the proper perspective and proportion. Some may love the pervasive darkness for fear that their deeds will be exposed but those who live by what is true would love the light of disclosure and discernment in their pilgrimage of the truth.

[127] To retain the impugned words in s 233 of the CMA would be inconsistent with our commitment to the principle and protection of freedom of expression that we have proudly reiterated and reaffirmed in the UDHR and ADHR.

DECISION

[128] We are unanimous in finding the impugned words of 'offensive' and 'annoy' in s 233 of the CMA constituting an offence to be inconsistent with art 10(1)(a) and 10(2)(a) of the FC read with art 8 thereof and hence unconstitutional and void. It is not a permissible restriction to freedom of expression under our FC. We therefore strike down that particular provision of

s 233 of the CMA consisting of the words 'offensive' and 'annoy' as constituting an offence. The appeal is allowed and the order of the High Court set aside.

[129] Being a constitutional matter, we make no order as to costs as no one is the winner but the Malaysian public where freedom of expression is concerned. We declare this decision to have prospective effect so as not to resurrect the past which is better left interned. Hence this decision of the court will affect all those cases where there has not been any conviction and sentence passed or where the appeal process has not been concluded yet.

POSTSCRIPT

[130] Living in a society as diverse as ours, we give space to one another in appreciating and accommodating diverse views, thoughts and ideas on a multitude of matters. Some may use loud and lambaste language to so express their views and others do it on a more scholarly and subdued tone in agreeing to disagree.

[131] The virtual community has a way of restoring equilibrium and even equanimity when the line has been crossed. To create more offences in the virtual space would be a retrogressive step bordering on needless censorship just because some people's ideas may not be so palatable. In living and let live we make space for one another in the virtual market place of ideas.

[132] It remains for us to record our appreciation to all counsel including those who have filed their amicus briefs and their scholarly submissions.

Appeal allowed; High Court's order set aside with no order as to costs; court declared that decision to have prospective effect.

Reported by Dzulqarnain Ab Fatar